FILED
DEC 4 1962
JOHN F. DAVIS, CLERK

IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1962.

No. 634

JOEL McDANIEL,
*Petitioner,*

vs.

CAMPBELL, WYANT & CANNON FOUNDRY COMPANY and MICHIGAN MUTUAL LIABILITY COMPANY,
*Respondents.*

## PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MICHIGAN

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## PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MICHIGAN

(Numbers in parentheses followed by letter "a" indicate pages of the appendix of defendants-appellants filed in the Court below unless otherwise clearly identified. Lower case Roman numerals in parentheses indicate pages of the Appendix attached hereto)

Petitioner Joel McDaniel prays that a writ of certiorari issue to review the judgment of the Supreme Court of the State of Michigan entered September 7, 1962.

## OPINIONS BELOW

The Award of the Hearing Referee of the Michigan Workmen's Compensation Department (8a, 9a) is unreported. The Opinion and Order of the Michigan Workmen's Compensation Appeal Board (11a, 13a) is not of-

ficially reported, but may be found at *1960 Mich. Workmen's Comp. Dept. Opinions on Review 691* (W. C. Opinions, Box 38 Alfred St. Sta., Detroit, Mich.). The Opinion of the Supreme Court of the State of Michigan (i) is reported at 367 Mich. 356.

## JURISDICTION

The judgment of the Supreme Court of Michigan reversing the Appeal Board of the Michigan Workmen's Compensation Department and remanding the case to it for entry of a consistent order (xii) was dated and entered on September 7, 1962. The jurisdiction of this Court is invoked under 28 *U. S. C.* 1257 (3).

## QUESTION PRESENTED

Does Part VII, Section 4 of the Michigan Workmen's Compensation Act (*Michigan Compiled Laws* of 1948, Section 417.4, *Michigan Statutes Annotated* 17.223) as construed by the Court below, operate to deprive petitioner of equal protection of the laws within the meaning of *Article* XIV of the *Amendments* to the *United States Constitution* in limiting the total amount of weekly compensation benefits payable to him for occupational silico-tuberculosis to $10,500, as contrasted to upwards of $28,500 payable for other types of occupational disabilities, where all of petitioner's exposure to the causes and conditions giving rise to the occupational disease occurred *after* the effective date of the Occupational Disease Amendments to the Michigan Workmen's Compensation Act (Act 245 of the *Public Acts* of 1943, *Michigan Compiled Laws* of 1948, Sec. 417.1 et seq., *Michigan Statutes Annotated* 17.220 et seq., effective date July 30, 1943)?

The Supreme Court of the State of Michigan reversed the Appeal Board of the Michigan Workmen's Compensation Department and held the answer to be "No." Petitioner respectfully contends that the answer should be "Yes" and seeks this writ of certiorari to review that holding.

## CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

1. *United States Constitution, Amendment* XIV, Section 1:

> "All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

2. *Michigan Compiled Laws* of 1948, Section 417.4; *Michigan Statutes Annotated* 17.223, Part VII, Section 4 of the Michigan Workmen's Compensation Act:

> "Compensation shall not be payable for partial disability due to silicosis or other dust disease. In the event of temporary or permanent total disability or death from silicosis or other dust disease, notwithstanding any other provisions of this act, compensation shall be payable under this part to employees or to their dependents in the following manner and amounts: If disablement or death occurred during the first calendar month in which Act No. 61 of the Public Acts of 1937 became effective not exceeding the sum of $600.00; if disablement or death occurred during the second calendar month after such act became effective not exceeding the sum of $700.00; thereafter the total compensation and benefits payable for disability and death shall increase at the rate of $100.00 each calendar month. The aggregate amount payable shall be determined by the total amount payable in the month in which disablement or death occurs. In no event shall such compensation exceed an aggregate total of $10,500.00; Provided, That rights accruing prior to the effective date of this amendatory act shall be preserved and governed by the provisions of this section prior to the effective date of this amendatory

act: Provided, That where silicosis or other dust diseases were first made compensable by Act No. 245 of the Public Acts of 1943, then in such instances the graduated benefit provision of this section shall begin to apply to disability or death resulting from such diseases as of the effective date of such act."

## STATEMENT OF THE CASE

### A. Chronology and Personal Data.

Joel McDaniel, the petitioner, is a 35 year old married man with four dependent children. He commenced working for Respondent Campbell, Wyant & Cannon Foundry Company in Muskegon, Michigan in July of 1947 (14a). He was exposed to unusual and excessive amounts of free crystalline silica dust in his employment from that time until he became disabled by silico-tuberculosis on December 10, 1956 (14a) when Respondent Mich. Mutual Liability Co. was compensation insurance carrier. He was admitted to the Muskegon County (Michigan) Sanatorium on December 13, 1956 (2a, 3a), and remained there until he was released on September 17, 1958 to return to limited work, not in a foundry or other silica hazard, and for no more than 30 hrs. per week (15a, 56a, 57a).

An application for workmen's compensation benefits was filed (4a) and after hearing, the Hearing Referee found that McDaniel had sustained a compensable personal injury on December 10, 1956 and that he was a married man with four dependent children, and awarded him disability compensation at the rate of $57.00 per week from December 11, 1956 until December 17, 1957 and continuing thereafter until further order of the Workmen's Compensation Department, with the provision that such payment should not exceed the aggregate amount of $10,500 (8a, 9a). This award further provided that respondents should reimburse plaintiff for the use and benefit of the Muskegon County Sanatorium the sum of $11.68 per inpatient day during his period of hospitalization (9a).

The Workmen's Compensation Appeal Board entered an opinion and an order on November 10, 1960 affirming and modifying the award of the Referee by removing the $10,-

500 limitation and granting interest at the rate of 5% upon all compensation benefits past due from the due date thereof until payment is made (11a, 12a).

From this order respondents duly filed an application for leave to appeal to the Supreme Court of Michigan, which application was granted (75a).

After briefing and oral argument on two occasions, the Supreme Court of Michigan filed its Opinion dated September 5, 1962 (i), holding *inter alia* that the $10,500 limitation on aggregate compensation payable in cases of silicosis or other dust disease did apply to petitioner, and as so applied, did not constitute a denial of the equal protection of the laws guaranteed by Article XIV of the Amendments to the Constitution of the United States. Its Order reversing and remanding for consistent proceedings was entered on September 7, 1962 (xii).

## B. Presentation of the Federal Question.

A violation of Article XIV of the Amendments to the Constitution of the United States was first asserted by petitioner in his cross-application for review of the award of the Hearing Referee insofar as it limited the amount of total weekly compensation payable to the sum of $10,500.00 (10a). The Federal Question was next presented by the Michigan Compensation Appeal Board in its opinion (34a, 35a) in its holding that Part VII, Section 4 of the Michigan Workmen's Compensation Law which limits the aggregate of weekly benefits payable in a silicosis or other dust disease to $10,500.00 is not applicable to plaintiff in the case at bar, since if it were construed to be applicable to plaintiff's case it would violate Article XIV of the Amendments to the Constitution of the United States. This construction of the statute was protested by respondents in their application for leave to appeal (48a) and the Supreme Court of Michigan specifically held that the statute in question as applied to McDaniel's case "does not involve a denial of equal protection of the laws" (iv).

## REASONS FOR GRANTING THE WRIT

The Michigan Workmen's Compensation Act, Occupational Disease provisions, have not been construed by this Court in the light of the Fourteenth Amendment. The construction of the Supreme Court of Michigan affects adversely a large segment of Michigan workers, miners and foundrymen, and may be used to support other obsolete and invidious distinctions among workmen's compensation claimants throughout the United States.

### A. Historical Background of the Law.

The historical background of the enactment in Michigan of the various legislative Acts relating to the compensability of silicosis and other dust diseases is relevant to an examination of the problem herein involved. A complete statement of this history is found in *Gauthier vs. Campbell, Wyant & Cannon Foundry Company*, 360 Mich. 510, 104 N.W. 2nd 182 (1960) and is here summarized for convenience.

Although the first Michigan Workmen's Compensation Act was passed in 1912, no compensation was provided for occupational diseases until Part VII was added to the Act by *Public Acts* of 1937, No. 61 (effective October 29, 1937), which provided compensation only for the particular occupational diseases listed in an attached schedule, among which was silicosis as a result of mining, pneumoconiosis which resulted from quarrying, cutting, grinding or polishing of metal, stoneworkers or grinders' phthisis and other provisions. Compensation for disablement from "silicosis or other dust disease" occurring in the first month after the effective date of this Act was limited to $500 with an additional $50 added for each additional month of exposure before disablement or death, up to a maximum of $3,000.

*Public Acts* of 1943, No. 245 (effective July 30, 1943) eliminated the occupational disease schedule and provided that *any disabling occupational disease* should be treated as are other personal injuries under the Act. Thus silicosis or pneumoconiosis was covered, however acquired;

for example, in general foundry work as was the case with the petitioner, McDaniel.

The same stepladder method of determining maximum benefits payable was likewise applied to diseases first made compensable by the 1943 Amendment (supra p. 3) although the dollar amounts were raised; hence, a general foundry laborer disabled during the first month after the effective date of the 1943 Amendment was entitled to $600 in total compensation with an additional $100 for each additional month of exposure before disablement or death. The maximum was increased by this Act to $4,000. *Public Acts* of 1945, No. 318 (effective 5 28 45) raised the maximum to $6,000. *Public Acts* of 1951, No. 278 (effective 6 29 51) raised the maximum to $10,500 where it remains to this day.

This stepladder approach to compensation was first proposed in the report of a special Commission of Inquiry created by statute (*Public Acts* of 1935, No. 164 (effective 9/21/35), to investigate and recommend the proper approach to compensation for occupational disease. This report recommended compensation coverage for silicosis and other dust disease but sharply limited in scope (1937 Michigan House Journal, Volume 2, pages 159, 160, quoted in *Rueter vs. Rinshed Mason Co.*, 303 Mich. 550, 6 N.W. 2nd 887 (1942)):

> " 'The matter of accrued liability arises. We mean that when the act becomes effective there will be workmen who will have been exposed to an occupational disease for quite some time, perhaps years, before the act becomes effective, and disability may result within a very short period of time after the act becomes law. We recommend that the provisions of the New York act be followed: namely, if disability or death occurs during the first calendar month in which the act becomes effective, total compensation to be paid should be limited to $500; if either occurs during the second calendar month, the amount to be paid should not exceed $550, and thereafter, the total of compensation payable for disability or death should increase at the rate of $50 for each calendar month until the limits provided in the compensation act for accidents be reached, excepting that in cases of dis-

> ability or death due to silicosis and other dust diseases the maximum should be $3,000.' "

The recommendation of the Commission of Inquiry was followed by the Legislature in all respects.

The explicit purpose of the statutory scheme was to insulate the employers in the dusty trades against the consequences of employee disablement occurring shortly after the effective date of the Act caused largely by previous exposure to dust hazards. The method chosen was to limit sharply the amount of compensation payable to employees whose disability or death occurred shortly after the effective date of the Act, increasing it by a small amount for each succeeding month of work in exposed employment. The Legislature's fear was that unless such a stepladder approach was adopted, the cost of compensation insurance might be such as to force certain industries out of the state and render workers in those industries unemployed.

This legislative history, the supporting reasoning, and the bitter consequences for the affected workers was lucidly and thoroughly discussed by the Michigan Supreme Court in *Gauthier vs. Campbell, Wyant & Cannon Foundry Company*, 360 Mich. 510, 104 N.W. 2nd 182 (1960). The Michigan Supreme Court there described the legislative purpose in explicit terms:

> "The legislative scheme as exemplified in the silicosis amendments included both monthly gradations and overall maximum limitations on benefits designed to lessen the economic impact on industry of accumulated exposure." (523).

In *Gauthier* the Michigan Supreme Court declined to hold that there was "no rational basis for the legislative scheme which Michigan actually adopted" (522) as to a worker who acquired his silicosis by reason of exposure to silica dust over the period 1924 to 1947 on the ground that Gauthier by reason of 19 years' exposure prior to the 1943 amendments to the Compensation Act, did actually present a case of "accrued liability."

**B. McDaniel's Case.**

No question of accrued or accumulated liability arises with respect to McDaniel since he was first employed in a dust hazard on July 7, 1947, nearly four years after the effective date of the 1943 Amendment which made this disease acquired in this occupation compensable. Yet McDaniel has been confined to the maximum benefits provided under the statute for silicosis or other dust disease, $10,500, just as if he did in fact represent an instance of accrued and accumulated liability.

Had McDaniel suffered an injury to his back or leg, or an injury to his lungs through noxious gas, or the identical disease, tuberculosis, through occupational contagion (*Mills vs. T. B. San.*, 323 Mich. 200, 35 N.W. 2nd 239 (1948), his maximum entitlement to weekly benefits in his dependency classification would be $28,500 (500 weeks times $57 per week) plus permanent and total disability weekly benefits thereafter, if applicable. (Michigan Workmen's Compensation Act, Part II, Sections 9 and 10, *Michigan Compiled Laws* of 1948, Sections 412.9, 412.10, *Michigan Statutes Annotated* 17.159, 17.160). Disabled by dust disease, McDaniel can receive no more than $10,500, irrespective of the duration or extent of his disability or the number of his dependents.

The unequal operation of the statute is thus clear. The basis upon which the Legislature made the statute unequal: that is, a fear that employers in the dusty trades would be heavily penalized because of accrued or accumulated liability is also clear. And the fact that this reasoning cannot apply to McDaniel since he was never employed in the hazard before the effective date of the Occupational Disease Amendment in 1943 is equally clear.

Faced with these unequivocal circumstances, the Michigan Workmen's Compensation Appeal Board held that the Legislature cannot have intended its limitation upon the amount of maximum compensation payable to apply to McDaniel and other persons whose injurious exposure commenced after the effective date of the 1943 Act, because to construe the limitation to apply to McDaniel would be to render it unconstitutional as a denial of equal protection of the laws (32a-35a).

The Michigan Supreme Court below reversed this holding of the Workmen's Compensation Appeal Board, asserting in its opinion that although the legislative intent in providing the stepladder approach was in fact the problem of accrued or accumulated liability, which did not exist with respect to McDaniel, there might be other justifications for confining him to a measure of weekly compensation, substantially less than half that enjoyed by workers whose disabilities arise under other circumstances.

The Michigan Supreme Court felt that its duty lay, despite the clear obsolescence of the Legislature's stated purpose, in seeking some "conceivable" basis for the disparity in treatment of McDaniel:

> "It is enough if a state of facts can be conceived which would form a reasonable basis for the classification" (iii).

Acting pursuant to this self-imposed duty, the Michigan Supreme Court reviewed certain publications quoted in respondent's brief below and concluded that non-discriminatory treatment for silicosis:

> "might conceivably involve financial risks and burdens so confiscatory as to drive them [dust-hazard industries] out of business or out of the state * * *" (iv).

We believe that the Michigan Supreme Court grievously erred in its inferences from the incomplete quotations from the cited publications but do not argue this point here. A much more fundamental error in our view is found in the Michigan Supreme Court's rejection of the Workmen's Compensation Appeal Board's position that the reason for the legislative classification having become obsolete and inapplicable as to McDaniel, that classification constitutes a denial of equal protection of the laws to McDaniel if the statute is so construed as to embrace him in its scope.

There is no question but that a statute originally constitutional at the time of its enactment may, through passage of time and alteration of circumstances, become an unconstitutional deprivation of equal protection of the laws.

*Brown vs. Board of Education*, 347 U. S. 483, 98 L. ed. 873, 74 S. Ct. 686; *Nashville C. and St. L. R. Co. vs. Walters*, 294 U. S. 405, 79 L. ed. 949, 55 S. Ct. 486. And see *Vigeant vs. Postal Telegraph Cable Co.*, 260 Mass. 335, 157 N.E. 651, 53 *A. L. R.* 867 and cases cited therein.

The Court below held, and we concede, that as a general proposition a statute must be presumed to be constitutional, and that statutory classifications will be held to be reasonable if a state of facts can be conceived which would justify them. But we respectfully submit that the reasonableness of the classification imposed by statute must always be judged in terms of the Legislature's *purpose* in making it. 12 *Am. Jur. Constitutional Law*, Section 481 (p. 153):

> "The precept most often employed states that a classification to be valid must always rest on a difference which bears a fair, substantial, natural, reasonable, and just relation to the object, act, or persons in respect to which it is proposed."

Citing *Carmichael vs. Southern Coal & Coke Co.*, 301 U. S. 495, 81 L. ed. 1245, 57 S. Ct. 868; *Great Atlantic & Pacific Tea Co. vs. Grosjean*, 301 U. S. 412, 81 L. ed. 1193, 57 S. Ct. 772, and numerous other cases.

A determination of the *purpose* of the enactment is of the very essence of a determination of the reasonableness of the classification employed, and differences which may constitute a valid classification for some purposes furnish no reason whatever for classification for other purposes:

> "Red things may be associated by reason of their redness, with disregard of all other resemblances or of distinctions. Such classification would be logically appropriate. Apply it further; make a rule of conduct, depend upon it, and distinguish in legislation between red-haired men and black-haired men, and the classification would immediately be seen to be wrong; it would have only arbitrary relation to the purpose and province of legislation."

*Tanner vs. Little*, 240 U. S. 369, 60 L. ed. 691, 36 S. Ct. 379.

In few cases is a reviewing Court favored, as it is in the case at bar, with an explicit and authoritative contemporaneous statement of the plan for legislation and the reason for the plan, adopted *in toto* by the Legislature so that the intent and purpose of the legislation is beyond question. The report to the legislature of the legislatively-created Commission of Inquiry may, of course, be considered in determining the intent of the recommended legislation. See generally *Harrison vs. Northern Trust Co.*, 317 U. S. 476, 87 L. ed. 407; 63 S. Ct. 361. This rule has specific reference to resort to the reports of special commissions, if the recommendations are followed, to determine the purpose and intent of the legislation. *Woodward vs. De-Graffenreid*, 238 U. S. 284, 59 L. ed. 1310, 35 S. Ct. 764; *The Delaware*, 161 U. S. 459, 40 L. ed. 771, 16 S. Ct. 516; *Tenement House Dept. vs. Moeschen*, 179 N. Y. 325, 72 N.E. 231, Affirmed 203 U. S. 583, 51 L. ed. 328, 27 S. Ct. 781.

We contend that the Michigan Supreme Court had no warrant nor reason to extend the "conceivable" purpose of the Legislature beyond that which was expressly stated: the prevention of financial burdens upon employers in the dusty trades by reason of accrued or accumulated liability.

Thus, we respectfully submit that the purpose for which this law was enacted is the only method by which the validity of its classification can be judged; and the only valid inquiry is, "Is McDaniel in that class of persons whom the Legislature judged should have their rights to compensation curtailed by reason of the problem of accrued liability?" The answer is plain: he is not. The fact that the Legislature might, if it were sitting today in consideration of this matter, enact a similar statute for a completely different purpose does not bear, we submit, upon the validity of the classification as applied to McDaniel.

### C. Proposed Remedy.

The only practicable remedy which we can propose to this erroneous action of the Michigan Supreme Court is that the limitation upon total benefits payable for silicosis or other dust diseases contained in Part VII, Section 4 of the Michigan Workmen's Compensation Act should be de-

clared to be invalid as a denial of equal protection of the laws as applied to a worker whose exposure in the dusty trades commenced after July 30, 1943. Invalidity of an exclusionary provision of a state workmen's compensation act because of denial of equal protection of the laws results in the injured worker becoming entitled to the full benefits of the statute. *Quong Ham Wah Co. vs. Industrial Accident Commission*, 184 Cal. 26; 192 P. 1021, 12 *A. L. R.* 1190, Writ of Error dismissed 255 U. S. 445, 65 L. ed. 723, 41 S. Ct. 373. We suggest that such a remedy is here appropriate and seek certiorari to that end.

## CONCLUSION

For the foregoing reasons, it is requested that the Petition for a Writ of Certiorari be granted.

Respectfully submitted,

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Dated: November 19, 1962.

(Appendix follows).